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No. 85-1080

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

SAN DIEGO GAS & ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,

Appellees.

On Appeal From The Supreme Court of California

MOTION TO DISMISS APPEAL OR AFFIRM BY APPELLEE, CITY OF SAN DIEGO

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On Appeal From The Supreme Court of California

MOTION TO DISMISS APPEAL OR AFFIRM BY APPELLEE, CITY OF SAN DIEGO

Pursuant to Rule 16 of this Court, appellee, The City of San Diego,[1] moves that the appeal herein taken be dismissed on the grounds that the judgment rests on an adequate nonfederal basis

[1] The City of San Diego was a party to the proceeding below and is therefore an appellee pursuant to Rule 10.4 of this Court. See, Appellant's Appendix ("Appendix"), pp. A-2 and A-27.

and the appeal does not present a substantial federal question; or, in the alternative, that the decision below be affirmed because the questions presented are so unsubstantial as not to merit further argument.

STATUTES AND CONSTITUTIONAL PROVISIONS

Appellant's Jurisdictional Statement adequately sets forth the appropriate statutes and constitutional provisions involved.

STATEMENT OF THE FACTS AND CASE

Appellant's statement of the case is misleading and inaccurate in numerous instances; however, for the most part, said inaccuracies relate to the merit of the issues and are irrelevant to the question of jurisdiction. Only a brief recitation of the salient facts is therefore appropriate.

In 1974 San Diego Gas & Electric Company ("SDG&E") entered into a long-term oil contract with Tesoro Alaskan Petroleum Company ("Tesoro"). Appendix, p. A-13. Effective January 1, 1979, SDG&E and Tesoro entered into a "Restated Agreement" which initially reduced SDG&E's oil obligation in 1979 and 1980 but increased deliveries in 1981, 1982 and 1983. *Id.* In Decision 91106, 2 CPUC 2d 572 (Dec. 19, 1979) the California Public Utilities Commission ("Commission") reviewed the record period January 1, 1979 through June 31, 1979 and specifically held over for later review all reasonableness issues other than certain rulings on oil sale losses. *Id.* at 577, 589-590. In Decision 91545, 3 CPUC 2d 503 (April 15, 1980) the Commission again specifically held over for later review all reasonableness issues for 1979 except as noted above. *Id.* at 503, 509-510.

Thereafter, the Commission did rule upon the reasonableness of certain other fuel related expenses by the Company during 1980,

1981 and 1982. In Application 83-07-16 (this case) the City of San Diego made an appearance as an interested party and argued that the reasonableness of the Restated Agreement had never been decided by the Commission and requested that the Company address that issue. Appendix, p. A-5. The Administrative Law Judge agreed and the issue was addressed at evidentiary hearings held for that application. *Id.* On February 1, 1984, the Commission issued Decision 84-02-005, an interim opinion, which upheld the ALJ's ruling that the Restated Agreement was at issue and further held that the agreement was unreasonable and that further hearings be held to determine the amount of a disallowance, if any. Appendix, pp. A-22 through A-25. Subsequently, evidentiary hearings were held to determine the appropriate disallowance. On December 5, 1984, the Commission issued Decision 84-12-026 which held that the appropriate disallowance should be $45,060,000 which was the amount that SDG&E paid to Tesoro not to receive fuel oil under the Restated Agreement for the record period then under review, July 1, 1982 to December 31, 1983. Appendix, pp. A-57, A-65. The Commission did not disallow any expenses incurred from January 1, 1979 to June 30, 1982. Appendix, p. A-28.

NATURE OF THE PROCEEDINGS BELOW

As SDG&E outlines in its Jurisdictional Statement, the ECAC procedure was adopted to account for recognition of up or down changes in the cost of fuel and energy. *See e.g., City of Los Angeles v. Public Utilities Commission*, 15 Cal.3d 680, 695-696 (1975). Reviews of the reasonableness of operations for a prior "record period" occur for the utility and only reasonable fuel costs, reasonably incurred, are recovered. Decision 92496, 4 CPUC 2d 693, 700-701 (Dec. 5, 1980). During that review, the Commission reviews the reasonableness of fuel oil contracts. *Id.* at 700.

In evidentiary hearings that take place before an Administrative Law Judge, the utility has the burden to prove the reasonableness of its fuel related expenditures with clear and convincing evidence. The reason for this rule is sound. The utility is the sole party in possession of evidence concerning the prudency of its past actions. Decision No. 83-10-001 (1983), at page 3. No other party to the proceeding has similar access to the evidence. Consequently, the utility must prove that its actions were reasonable, and it is not for the Commission, the staff, or any other party to prove to the contrary.[2] *Id.*; Decision 65210, 60 CPUC 183 (1962).

It is important to note that SDG&E does not challenge the validity of the ECAC procedure nor contend that the Commission had no authority to make rules or retain jurisdiction, for later review, of the reasonableness of fuel expenses for the 1979 period.

ARGUMENT

An important perspective to maintain throughout a review of the questions presented by SDG&E is that SDG&E is a public utility in Southern California providing essentially monopoly service to its ratepayers. It is uncontested below that SDG&E paid Tesoro some $45,000,000 *not* to take oil it had contracted for under the Restated Agreement. It is this sum that SDG&E seeks to recover from its ratepayers despite the fact that the ratepayers would be paying for a commodity that would not provide them with any benefit.

Finally, SDG&E cannot contend it was not given a hearing and opportunity to present evidence as required under California law. The Commission has made proper findings and followed all statutory requirements. Absent a clear showing that the limits of

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[2] Throughout the Jurisdictional Statement, SDG&E seeks to shift this burden of proof by stating that no evidence was presented to the Commission to show that the Restated Agreement was unreasonable in various respects. This Court should remember that SDG&E had the burden to show its action reasonable.

due process have been overstepped, this Court should not intervene. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1941). SDG&E has failed to make such a showing here.

I

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The federal questions presented must be substantial in order for this Court to exercise jurisdiction over an appeal. *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390, 391 (1951). Here SDG&E appeals on the ground that a decision of the California Public Utilities Commission is repugnant to the Constitution of the United States in several respects. A brief review of the questions raised will reveal that they are not substantial and do not warrant further argument.

A

SDG&E WAS NOT DENIED DUE PROCESS BY THE "PERSPECTIVE" OF THE COMMISSION DECISION

SDG&E's argument on this point, at Jurisdictional Statement p. 12 *et seq.*, is totally devoid of any statutory or decisional law to support its contention that the "perspective" of the Commission decision somehow denied them due process. That fact alone indicates that the point raised is not a substantial federal question.[3]

[3] To the extent that SDG&E cites decisions of the Commission, such arguments raise issues of state law interpretation, not federal, and should not invoke the jurisdiction of this Court.

In addition, however, reference to the Commission decision shows that the Commission did in fact review the Restated Agreement in light of the conditions which existed at the time of its formation. For example, in discussing the flexibility of the HIRI fuel oil contract option, the Commission looked at SDG&E's own calculations of fuel oil availability, *known to SDG&E at that time*, and determined the economic benefit of the Agreement based on information also available to SDG&E at that time. Appendix at pp. A-15 and A-16. Additionally, the Commission found that SDG&E was, at the time it entered into the Restated Agreement, attempting to avoid an assessment of a $1/bbl penalty on rejected natural gas. *Id.* at A-17. *See also*, A-18 through A-21. It is clear therefore that the Commission took into consideration the facts apparent to SDG&E at the time of the Restated Agreement. No substantial federal question is thus raised on this issue.

B

SDG&E WAS NOT DENIED DUE PROCESS BECAUSE SUFFICIENT UNCHALLENGED CONCLUSIONS AND FINDINGS EXIST TO SUPPORT THE DECISION

SDG&E states that the Commission decision holding the Restated Agreement unreasonable rests on only three grounds. Appellant's Jurisdictional Statement at p. 17. Appellant either misunderstands or misstates the appropriate decision of the Commission. In its interim decision, the Commission makes four separate conclusions why the Restated Agreement was unreasonable and makes nine separate findings of fact to support those conclusions. Appendix, pp. A-23 to A-25. The four cited conclusions are:

> 1. SDG&E was unreasonable in entering the 1979 Restated Agreement with Tesoro because at that time the perceived benefits did not outweigh

the risks shown in the utility's own economic analysis.

2. SDG&E was unreasonable because the utility failed to conduct adequate studies before entering into the 1979 Restated Agreement.

3. SDG&E was unreasonable because the utility attempted to shield the shareholders from Commission penalties and the short-term carrying costs of excess LSFO inventory at the long-term expense of the ratepayers.

4. SDG&E was unreasonable because the utility failed to adequately consider the possibility that greater quantities of natural gas than were forecast would become available despite its past experience in understating gas availability.

The cited findings are:

13. At the time SDG&E entered into the 1979 Restated Agreement, the utility projected fuel savings of just $500,000 from the agreement.

14. The 1979 Restated Agreement eliminated the flexibility in contract volumes SDG&E had in the HIRI contract and substituted an inflexible take-or-pay obligation to Tesoro.

15. The utility's economic analysis showed the 1979 Restated Agreement reduced the probability of excess LSFO in 1979 and 1980 but increased the probability of excess LSFO in 1981 and 1982.

16. At the time SDG&E entered into the 1979 Restated Agreement, the perceived benefits did not

outweigh the risks shown in the utility's own analysis.

17. SDG&E was preoccupied with the possibility of a $1/bbl penalty for rejecting cheaper natural gas when it entered the 1979 Restated Agreement.

18. SDG&E entered into the 1979 Restated Agreement [*sic*] to shield its shareholders from the carrying costs of an excess LSFO inventory in 1979 and 1980.

19. SDG&E did not conduct adequate studies before entering into the 1979 Restated Agreement.

20. SDG&E did not follow the recommendations of the Gilbert Report before entering into the 1979 Restated Agreement.

21. At the time SDG&E entered into the 1979 Restated Agreement, the utility had not considered the possibility that more natural gas would be available than was forecast even though the utility's gas forecasting methodology had consistently understated the volumes of natural gas that became available in 1975, 1976, 1977, and 1978.

In its Jurisdictional Statement, SDG&E attacks only one of the conclusions (No. 1 above) and two of the findings (Nos. 14 and 16). Appellant's Jurisdictional Statement at pp. 16-21. Even if conclusion No. 1 and finding Nos. 14 and 16 were not supported by substantial evidence, this Court should conclude that the decision below is supported by the other conclusions and findings,

which remain unchallenged,[4] and thus the decision does not raise a substantial federal question.

In any event, evidence does exist in the record to support the challenged findings and conclusions.

1. THE FLEXIBILITY OF THE HIRI CONTRACT IS SUPPORTED BY THE EVIDENCE

SDG&E misstates the Interim decision (Decision 84-02-005) below when it states, at page 19 of the Jurisdictional Statement, that the Commission found that SDG&E could rely on anywhere from 14,000 barrels of oil a day (bbl/day), from HIRI, to 28,800 bbl/day. The decision, at page A-15, correctly states that SDG&E could have increased HIRI volumes from 14,000 bbl/day to 28,800 bbl/day. Thus, when the decision states that the range was from 5.1 million bbl/year to 10.5 million bbl/year that statement correctly reflects the HIRI option. It is that flexibility the Commission relied upon. SDG&E had a choice of receiving either of the two volumes. This did in fact represent flexibility that SDG&E chose to ignore. Contrary to there being no evidence on that point, therefore, SDG&E admits that the flexibility the Commission refers to was there.

As to Amendment 7 of the HIRI contract, SDG&E does not contend that the HIRI contract was not in evidence at the hearings.[5] It logically follows that Amendment 7, being part of the contract, was properly before the Commission for consideration.

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[4] Since SDG&E does not challenge the other findings and conclusions, this Court should decline to review them. *Grayson v. Harris*, 267 U.S. 352, 358 (1924).

[5] That it was is reflected in the discussion at p. A-15 of the Appendix.

2. EVIDENCE EXISTS TO SUPPORT THE CONCLUSION THAT THE RISKS OF THE RESTATED AGREEMENT OUTWEIGHED THE PERCEIVED BENEFITS.

SDG&E makes only several conclusory statements in regard to the above argument. Jurisdictional Statement at p. 20. Contrary to those statements, a review of the decision, at pages A-13 through A-21 of the Appendix, clearly shows a detailed analysis of the evidence presented which supports the conclusion.

C

SDG&E WAS NOT DENIED DUE PROCESS BY THE ABSENCE OF A FINDING OF APPROPRIATE ALTERNATIVE ACTION

As noted, *supra*, the burden was upon SDG&E to show the reasonableness of its actions. Having failed to do so, the Commission provided SDG&E an opportunity to present evidence establishing the "actual consequences" of the Restated Agreement for purposes of determining a proper disallowance. Appendix at p. A-22. SDG&E, however, took the opportunity to attempt to relitigate the reasonableness of the Restated Agreement. The Commission reviewed some of SDG&E's proffered evidence and properly determined that such was the case. Appendix at pp. A-59 through A-63.

Here, SDG&E does not argue that the Commission had not the power to make such determinations nor exclude such evidence. This it clearly has the power to do. California Constitution, Art. XII, Sections 2 and 6. SDG&E merely disagrees with the Commission's conclusion with respect to what the proffered evidence tended to show. Such factual disagreements are not for review by this Court. *Grayson v. Harris*, 267 U.S. 352, 358 (1924). The review and exclusion of that evidence, therefore, does not raise a substantial federal question.

D

SDG&E WAS NOT DENIED DUE PROCESS BY THE COMMISSION DECISION TO REVIEW THE RESTATED AGREEMENT

SDG&E does not argue that the Commission does not have the power to retain jurisdiction to review, at a later time, the reasonableness of utility actions. The California Commission clearly did so in this case.

The 1979 Restated Agreement, effective January 1, 1979, was to have been reviewed at the end of the appropriate record period, January 1 - July 31, 1979. The Commission, in Decision 91106, 2 CPUC 2d 572 (Dec. 19, 1979) specifically held open for later review those reasonableness issues. *Id.* at 577, 589-590. In the next review period, Decision 91545, 3 CPUC 2d 503 (April 15, 1980), the Commission again specifically held over for later review the reasonableness of fuel expenses for the entire year (January 1 - December 31, 1979). *Id.* at 503, 509-510. As noted previously, the Commission did rule upon certain reasonableness issues but not the Restated Agreement.

The crux of SDG&E's argument is that because the Commission found expenses from January 1, 1980 - June 31, 1982 reasonable, that determination somehow implies a finding of reasonableness in 1979. Nothing is further from the truth!

The California Supreme Court has long recognized that the findings of fact and conclusions of law necessary in Commission decisions be adequately supported by the evidence and that such findings and conclusions cover points material to the decision. *City of Los Angeles v. Public Utilities Commission*, 7 Cal.3d 331, 349 (1972).

SDG&E has not shown that any previous findings of fact or conclusions of law of the Commission held that the 1979 Restated

Agreement was reasonable. On the contrary, as previously noted, the Commission specifically retained jurisdiction over reasonableness issues for 1979. This Court, therefore, should decide that the reasonableness of the 1979 Restated Agreement was never litigated or decided by the Commission and was properly before it in this case.[6]

II

THE DECISION BELOW RESTS ON ADEQUATE NON-FEDERAL GROUNDS

Where the highest court of a state fails to deliver an opinion in a case in which the federal issues are properly presented, it is presumed that the decision below rests on adequate non-federal grounds. *Phyle v. Duffy*, 334 U.S. 431, 281 (1947). Here, SDG&E's Jurisdictional Statement raises mostly questions regarding the interpretation of factual issues decided by the Commission. Such factual review of state court decisions is normally not a function of this Court. *Grayson v. Harris, supra*. There being, as argued previously, sufficient evidence to support the conclusions of the Commission, questions concerning the resolution of disputed facts in one for state courts[7] and thus provides an adequate non-federal ground to support the decision below. Absent a showing by SDG&E that this state ground cannot account for the decision, jurisdiction should be declined. *Durley v. Mayo*, 351 U.S. 277, 281 (1955). SDG&E has not made such a showing here.

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[6] As noted in footnote 2, *supra*, this Court should not allow SDG&E to shift its burden of proof onto other parties. SDG&E never showed the reasonableness of the Restated Agreement, which it had the burden to do.

[7] The California Supreme Court has held that findings of fact by the Commission are similar to jury verdicts and are to be accorded similar treatment on review. *Toward Utility Rate Normalization v. Public Utilities Commission*, 22 Cal.3d 529, 537 (1978).

CONCLUSION

Appellant, SDG&E, has not presented any compelling arguments why the questions it raises are substantial or why the decision below does not rest on adequate non-federal grounds. Appellant merely disagrees with the findings and conclusions of the Commission as to its reasonableness in entering into the Restated Agreement. The Commission gave appellant the opportunity to present evidence and to be heard on the issue. There is no reason for this Court to exercise its jurisdiction in this case to decide questions purely within the competence of the Commission and California Supreme Court to decide. The appeal below should be dismissed or the decision below affirmed.

Dated: January 21, 1986

Respectfully submitted,

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